



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 16, 2005

Mr. Charles K. Eldred
Barney Knight & Associates
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Austin, Texas 78752

OR2005-01425

Dear Mr. Eldred:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 218904.

The City of Dublin (the "city"), which you represent, received a request for information pertaining to the employment and removal of an individual as the city's chief of police, including any documents pertaining to the individual's relationship with other officers. You state the city will release some of the requested information, but claim that some of the submitted information is privileged under Texas Rule of Evidence 503 or excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, and 552.117 of the Government Code. We have considered your arguments and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note that the submitted information consists of a completed investigation conducted by the city. Under section 552.022(a)(1) of the Government Code, a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it either is excepted under section 552.108 of the Government Code or is expressly confidential under other law. Sections 552.103 and 552.107 are discretionary exceptions to disclosure that protect the governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records

Decision Nos. 676 at 6 (2002) (section 552.107 is not other law for purposes of section 552.022), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). As such, sections 552.103 and 552.107 are not "other law" that make information confidential for the purposes of section 552.022. Therefore, the city may not withhold the submitted information under section 552.103 or 552.107 of the Government Code. However, the Texas Supreme Court has held that the Texas Rules of Evidence are other law for purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Sections 552.101, 552.102, and 552.117 also constitute other law for purposes of section 552.022; therefore, we will address your arguments for exception regarding this information under sections 552.101, 552.102, and 552.117 and Texas Rule of Evidence 503.

You assert that the information in Exhibit D-4 is privileged under Rule 503 of the Texas Rules of Evidence. Rule 503(b)(1) provides the following:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

In order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must do the following: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify

the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. See Open Records Decision No. 676 (2002). Upon a demonstration of all three factors, the entire communication is confidential under Rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 4527 (Tex. App.-Houston [14th Dist.] 1998, no pet.) (privilege attaches to complete communication, including factual information).

The city asserts that the information in Exhibit D-4 is a confidential communication between a city attorney and a city employee made for the purpose of rendering professional legal advice. Based on this representation and our review of the information at issue, we agree that this information consists of a privileged attorney-client communication that the city may withhold under Rule 503.

You assert that the information in Exhibits D-1, D-2, and D-3 is excepted under sections 552.101 and 552.102 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information protected by common law privacy. Section 552.102 of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.-Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976) for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101. Accordingly, we address the city's section 552.102 claim in conjunction with its common law privacy claim under section 552.101 of the Government Code.

In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found.*, 540 S.W.2d at 685. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has found that the following types of information are excepted from required public disclosure under common law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, see Open Records Decision Nos. 470 (1987) (illness from severe

emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

We note that you cite to the case of *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), in support of your privacy argument. In *Ellen*, the court addressed the applicability of the common law privacy doctrine to files of an investigation of allegations of sexual harassment. The submitted information does not involve a case of sexual harassment. Therefore, we find *Ellen* inapplicable in this instance. Furthermore, we note that the information pertains directly to the workplace behavior of a city employee. This office has found that the public has a legitimate interest in information that relates to employees of governmental bodies and their employment qualifications and job performance. *See* Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 542 at 5 (1990) (information in public employee's resume not protected by constitutional or common-law privacy under statutory predecessors to sections 552.101 and 552.102), 470 at 4 (1987) (public employee's job performance does not generally constitute the employee's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of governmental employees), 405 at 2 (1983) (manner in which public employee performed job cannot be said to be of minimal public interest); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow).

We have marked the information that the city must withhold under sections 552.101 and 552.102 in conjunction with common law privacy. We find, however, that none of the remaining information at issue is protected by common law privacy, and the city may not withhold it under section 552.101 or 552.102 on that ground.

Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5; *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985). After reviewing your arguments and the remaining information, we find that none of the information at issue is confidential under

constitutional privacy; therefore, the city may not withhold any of the submitted information under section 552.101 on that ground.

You assert that some of the submitted information is excepted under section 552.117 of the Government Code. Section 552.117(a)(2) excepts the home addresses and telephone numbers, social security numbers, and family member information of a peace officer as defined by Article 2.12 of the Code of Criminal Procedure, regardless of whether the officer made an election under section 552.024. Gov't Code § 552.117(a)(2); *see* Open Records Decision No. 622 (1994). Accordingly, we conclude that the city must withhold the information we have marked under section 552.117(a)(2). In addition, we note that the submitted audiotape also contains information that is excepted under section 552.117(a)(2). If the city is unable to redact the portions of the audiotape that reveal this information, the tape must be withheld in its entirety pursuant to section 552.117(a)(2). *See* Open Records Decision No. 364 (1983).

We note that some of the information at issue may be excepted under section 552.1175 of the Government Code, which provides in part the following:

(b) Information that relates to the home address, home telephone number, or social security number of [a peace officer as defined by article 2.12 of the Code of Criminal Procedure], or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(b). The submitted documents contain information pertaining to an "officer" who does not work for the city. If this individual is currently a licensed peace officer who elects to restrict access to this information in accordance with section 552.1175(b), the city must withhold the information, which we have marked, under section 552.1175.

We note that the remaining documents contain Texas motor vehicle record information. Section 552.130 of the Government Code provides in relevant part the following:

(a) Information is excepted from the requirements of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

Gov't Code § 552.130. The city must withhold the Texas motor vehicle record information we have marked under section 552.130.

We also note that the information in the submitted floppy disc labeled "End Cache 1/ Start Cache 2" contains e-mail addresses of members of the public. Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, the city must withhold the e-mail addresses in the information within the submitted floppy disc labeled "End Cache 1/ Start Cache2" under section 552.137.

Finally, we note that some of the information at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

To conclude, the city may withhold the information in Exhibit D-1 under Rule 503 of the Texas Rules of Evidence. It must withhold the following: (1) pursuant to sections 552.101 and 552.102, the marked information that is confidential under common law privacy; (2) the information we have marked under section 552.117(a)(2), as well as the information excepted under section 552.117(a)(2) in the submitted audiotape; (3) the information we have marked under section 552.1175 if it pertains to a police officer who elects to restrict access to this information in accordance with section 552.1175(b); (4) the marked Texas motor vehicle record information under section 552.130; and (5) the e-mail addresses in the information within the floppy disc labeled "End Cache 1/ Start Cache 2" under

section 552.137. The city must release the remaining information at issue, but any information that is copyrighted may be released only in accordance with copyright law.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).


If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/seg

Ref: ID# 218904

Enc. Submitted documents

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